CPB (SARAWAK) SDN BHD

v.

SUMBER TEBRAU (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[ORIGINATING SUMMONS NO: S1-24-1871-1999]
13 JANUARY 2000

LAND LAW: *Caveat - Removal, application for - Entry of caveat in Form 19B - National Land Code 1965, s. 323 - Whether requirements complied with - Whether application for removal allowed*

The plaintiff who had acquired possession of the title to a piece of land ('the land'), applied to remove a private caveat entered by the defendant pursuant to s. 327(1) of the National Land Code 1965 ('the NLC'). The defendant claimed that it was entitled to enter the caveat by virtue of a sale and purchase agreement it had entered into in relation to the land.

Held:

[1] An aggrieved person is a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. Based on the facts, the plaintiff was an aggrieved person.

[2] The provision for entering a private caveat is governed by s. 323 NLC and sub-s. (2) requires that any such person or body wishing to apply for the entry of such a caveat shall do so in Form 19B. Such application shall be attested in accordance with the provisions of s. 211 and shall state therein the nature of the claim on which the application is based and whether the caveat is to bind the land itself or a particular interest only.

[2a] The "surat akuan" annexed to the Form 19B on which the defendant's application was based, did not state the nature of the claim. Also, it was not stated whether the caveat was to bind the land itself or a particular interest only.

[3] The defendant failed to comply with the mandatory requirement stipulated in Form 19B, *ie*, the need to describe in a schedule the land upon which the caveat was to be lodged. The defendant also failed to comply with s. 323(3) NLC which requires the defendant or its advocate and solicitor to verify by way of a statutory declaration giving rise to the claim thereto.

[4] The affidavit filed to oppose this application showed that the deponent did not understand the national language as the attached jurat showed that the contents of the affidavit had to be translated to him in English. However, the "surat akuan" affirmed by the same deponent bore no jurat. That was a fatal flaw because there was no evidence to show that the deponent did in fact understand the contents of the "surat akuan".

[5] The defendant failed to disclose or exhibit the sale and purchase agreement which was referred to in the "surat akuan". The failure to disclose such a material fact was a fatal error as any person making a search on his caveat application form would have no notice of the contents of the sale and purchase agreement which showed that the defendant only had an interest in a portion of the land.

[6] Even if the defendant had a caveatable interest in the land, it must take the land subject to the plaintiff's prior interest as the plaintiff had possession of its title.

[Plaintiff's application allowed.]

Cases referred to:
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 2 CLJ 713 ***(refd)***
Standard Chartered Bank v. Yap Sing Yoke & Ors [1989] 2 MLJ 49 ***(refd)***
Wu Shu Chen v. Raja Zainal Abidin bin Raja Hussin [1997] 2 CLJ 854 ***(refd)***

Legislation referred to:
National Land Code 1965, ss. 211, 323, (2), (3), 327(1)

For the plaintiff - Yee Teck Fah; M/s Yee Teck Fah & Co
For the defendant - Michael Chow; M/s A Rengganathan & Co

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

Facts

This is an application by the plaintiff for the removal of a private caveat on land held under H.S.(D)33860, No. P.T. 1185, Mukim Kawasan Bandar VI, Daerah Melaka Tengah, Negeri Melaka (the said property) entered by the defendant. There were also consequential orders prayed for.

By an agreement dated 20 May 1995 (the contract) entered into between Port Dickson Land Development Sdn Bhd (PDLD) and Chase Perdana Berhad (CPB), CPB had agreed to carry out and complete certain works (the works)

upon the terms and conditions contained therein. It was an express term of the contract that PDLD would procure a bank guarantee in favour of CPB for the contract sum (the contract sum) as defined in the contract. PDLD failed to procure the said bank guarantee despite the fact that CPB has carried out and completed certain portion of the works. To allay CPB's concern PDLD agreed to deliver and deposit the original document of title to the said property as security for the payment of the contract sum.

When the amount due under the contract reached RM30,554,800.78 (PDLD's debt), PDLD agreed to cause the property to be transferred and registered in the name of CPB or its nominee as part payment towards PDLD's debt. Before the execution of a settlement agreement dated 26 March 1999 between CPB and PDLD (the settlement agreement), PDLD assured CPB that a caveat lodged would be removed. Clause 3 of the settlement agreement provided that PDLD should take all steps and do all acts within its power to procure, *inter alia*, the defendant to execute and deliver to CPB a valid and registrable transfer to vest the ownership of the said property to CPB or its nominee.

Pursuant to the settlement agreement, Pembinaan Kota Laksamana (Melaka) Sdn Bhd (PKL) and CPB entered into an agreement dated 26 March 1999 (the PKL agreement). Clause 1 of the PKL agreement provided that in consideration of the premises contained therein, PKL agreed to transfer and to register the said property in favour of CPB or its nominee, free from all encumbrances and with vacant possession. CPB in exercising its right of nomination in accordance with the settlement agreement and the PKL agreement, nominated the plaintiff to be named as the transferee in the memorandum of transfer of the property. Notice of assessment of stamp duty on the memorandum of transfer of the property was issued by the stamp duty office on 19 June 1999. The plaintiff being dissatisfied with the assessment of stamp duty appealed against the assessment. The plaintiff's appeal was rejected by the stamp duty office on 27 August 1999. However, an extension of time up to 15 November 1999 was granted to the plaintiff to pay the stamp duty on the memorandum of transfer as assessed. A search made at the relevant land office revealed that the caveat lodged had not been removed and despite the plaintiff's solicitors letter of demand, the defendant had refused and failed to do so.

Findings Of The Court

The defendant opposes this application on the basis that it was entitled to enter the caveat by virtue of a sale and purchase agreement dated 12 March 1997 entered into between PKL as vendor and three other purchasers, namely, Nyala Singa (M) Sdn Bhd (Nyala), the defendant herein and one Tulin Panorama (M) Sdn Bhd, in respect of the said property.

The plaintiff's application to remove this caveat is pursuant to s. 327(1) of the National Land Code 1965 (NLC). The said section reads as follows:

327. Removal of private caveats by the Court.

(1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.

Aggrieved Persons

It is therefore necessary to see if the plaintiff is an aggrieved person under the Act. In *Wu Shu Chen v. Raja Zainal Abidin bin Raja Hussin* [1997] 3 CLJ 854; [1997] 2 MLJ 487 the Court of Appeal held that the word 'aggrieved' must be given its ordinary meaning. To be aggrieved means that one is dissatisfied with or is adversely affected by, a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. So said the Court of Appeal. The category of aggrieved persons is never closed. Pursuant to the facts which I had narrated in *extensio* to show the link, the plaintiff is indeed an aggrieved person.

How The Court Must Decide

It is fortunate that the decision of the Court of Appeal in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 2 CLJ 713; [1995] 1 MLJ 719 has made life easier for lesser mortals like us. The explicit guidance given is highly commendable. It advocates the procedure to be adopted when considering an application for the removal of a caveat, which is, that it should be a simple and summary one. At the first stage, the court will examine the grounds expressed in the application for the caveat to see whether they show a caveatable interest. Once the court is satisfied that the caveator's claim amounts in law to a caveatable interest, it must then go on to consider whether the claim discloses a serious question meriting a trial. After these two stages have been crossed, the court must decide where the balance of convenience lies. With this guideline, I will now examine the application made to register the caveat.

The Form 19B

The provision for entering a private caveat is governed by s. 323, and sub-s. (2) requires that any such person or body wishing to apply for the entry of such a caveat shall do so in Form 19B and such application shall be attested in accordance with the provisions of s. 211 and shall state therein the nature

of the claim on which his application is based, and whether the caveat is to be expressed to bind the land itself or a particular interest only. In the case before me, the Form 19B has been exhibited to the defendant's affidavit to oppose this application.

Under item 2 in the Form 19B, which requires the caveator to state the grounds for entering the caveat the defendant had merely stated 'Sila lihat Surat Akuan yang dilampirkan'. However, the 'surat akuan' did not state the nature of the defendant's claim. Therefore what appears before me is a Form 19B which does not state the nature of the defendant's claim on which the application to enter the caveat had been based. It does not even state whether the caveat is to be expressed to bind the land itself or a particular interest only.

Further, the Form 19B stipulates as a mandatory requirement the need to describe in a schedule the land upon which the caveat is to be lodged. Here again the defendant had failed to comply.

Another defect in the Form 19B is non-compliance with s. 323(3) of the NLC which requires the defendant or its advocate and solicitor, to verify by a statutory declaration, so far as it sets out, the claim of the caveator, giving rise thereto. There was an abject failure to comply with this subsection. Bound as I am therefore upon the authority of *Wu Shu Chen* which held that failure by a caveator to state the grounds to support the caveat would be sufficient for the court to remove his caveat, I had no hesitation in granting the applicant the relief sought.

Another interesting issue raised by the plaintiff was the fact that the 'surat akuan' was affirmed by a person who did not understand the National Language. The affidavit affirmed by one Alexander Gavin Brown, with a New Zealand passport, and having a residential address in Liaoning Province, China, filed to oppose this application, showed that the deponent did not understand the National Language as the attached jurat showed that the contents of the affidavit had to be translated to him in English. However, the 'surat akuan' which he has annexed to his caveat, bears no jurat. I find that this is also a fatal flaw because there is no evidence before me that the said same deponent who affirmed the 'surat akuan', did in fact understand the contents of the 'surat akuan'.

Further, based on the decision in *Wu Shu Chen* I find that the very fact that the defendant had failed to disclose or exhibit the sale and purchase agreement which he had referred to in the 'surat akuan', is also a fatal error because any person making a search on his caveat application form would have no notice of the contents of the sale and purchase agreement. There is force in

this finding because when the agreement was finally disclosed by the defendant in its affidavit, it showed that the defendant was not the only purchaser of the said property. As narrated in the facts the defendant was one of the three joint purchasers of the said property. This was never disclosed by the defendant even in its Form 19B. On the contrary, Alexander Gavin Brown states that the defendant purchased the said property. This is not true. The defendant, if at all it has an interest in the said property, clearly only has an interest in a portion of the said property. It therefore had no interest in the entire property and it failed to state this material fact in its application to enter the caveat.

Prior Claim

In any case even if it be held that the defendant has a caveatable interest in the said property, it must take the property, subject to the plaintiff's prior interest. I accept and adopt the reasoning of Lamin J (as his Lordship then was) in *Standard Chartered Bank v. Yap Sing Yoke & Ors* [1989] 2 MLJ 49 wherein his Lordship said at p. 53:

> There is no doubt in my own mind as to the position of the law that by virtue of the unregistered charge dated 1 April 1985 (exh SWK 1 to encl 3) in favour of the plaintiff, the plaintiff had acquired a title in equity over the said land. As the issue document of title was all the time in the custody of the plaintiff it had acquired a lien in equity over the land: *Vallipuram Sivaguru v. Palaniappa Chetty* ([1937] MLJ 59) and *Mercantile Bank Ltd v. Official Assignee of the Property of How Han Teh* ([1969] 2 MLJ 196). The depositee, *ie* the plaintiff bank in the present case, has the right to lodge a caveat and may do so at any time under the provisions of the National Land Code.

Therefore as in this case since the plaintiff has had possession of the title, it would take an interest prior to that of the defendant. Therefore on 11 November 1999 when I heard this application, I granted an order in terms of the plaintiff's prayers to remove the caveat, that is, prayer (1). I also granted an order in terms of prayers (2), (3), (4) and (5) being the consequential orders sought.